Very Truly
Thomas O'Brien

THE GREAT EXPERIMENT

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"In that land the great experiment was to be made by civilized man of the attempt to construct society upon a new basis; and it was then, for the first time, that theories hitherto unknown, or deemed impracticable, were to exhibit a spectacle for which the world had not been prepared by the history of the past."

"Democracy in America,"
De Tocqueville, Chap. 1.

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THOMAS DILLON O'BRIEN
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TO THE MEMORY OF

MY FATHER,

DILLON O'BRIEN,

WHO THOUGH HIMSELF ALIEN BORN LOVED, AND TAUGHT HIS CHILDREN TO REVERE AND LOVE THE AMERICAN REPUBLIC

I

THE RIGHT OF A PEOPLE TO A GOVERNMENT WHICH SHALL EFFECT ITS SAFETY AND HAPPINESS

MANY people are debating the propriety of changes, more or less radical, in our form of Government. We have those who hold the Constitution of the United States, even to its utmost detail, to be an immutable declaration of great principles, incapable of improvement or change. Others regard it as an archaic jumble of ancient laws serving only to retard progress and constituting an impregnable barrier to enlightened social and remedial legislation. There are also those, happily less numerous, whose disposition or chagrin at individual failure leads them to snap and snarl at all existing conditions; government, politics,

religion and business all come beneath their carping criticism. Finally we have the conscious traitor and corrupt agitator who may be dismissed with the couplet:

> No thief e'er felt the halter draw
> With good opinion of the Law.

An honest discussion of our government and its fundamental laws is not only legitimate but highly desirable. The right and ultimate power to change our form of government rest with the people, and those who possess that power should at least know and understand its fundamental principles. To quote from the Declaration of Independence:

> That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

There is nothing hidden or mysterious in

the American system of government, but it is very proper to ask, why was a republican form of government under a written constitution adopted? What evils of government were sought to be remedied? What has been the effect of the plan resolved upon? Does our system of government make for democracy? Does it give full scope to rightful individual liberty, or is it a millstone around the neck of the average man, holding him in poverty and wretchedness? These are questions which each citizen of the Republic must determine for himself, and they require study, reflection and discussion.

If our system of government cannot bear investigation, cannot answer a challenge as to its rightfulness, it must be bad, and should therefore be changed; but if, on the contrary, the written constitutions of our Federal and State Governments preserve to the individual, life, liberty, and the pursuit of happiness, and at the same time afford full opportunity for progress and progressive legislation, we should give them our hearty support, and only consent to a change in any particular

when fully convinced of the benefit to be derived from it.

There is another reason why no American should shrink from an open discussion of this subject. There are many constitutional provisions which relate to mere forms or methods of procedure. Take, for instance, the method of electing United States senators; no one will claim that our system of government was changed when the recent amendment was adopted providing for their election by a direct vote of the people, instead of by the various legislatures, nor would it now be considered a very radical change if the President were to be elected by a direct popular vote, nor if his term of office were extended to six or eight years. The fundamental principle is that we have a chief magistrate chosen by the people by a secret and free ballot, who holds office for a limited term and is subject during that term to removal by impeachment. The mere details and methods for securing these results may be changed again and again without impairing the fundamental principle itself.

While it is highly desirable that changes in the fundamental law should be made only after long and full deliberation, it is inevitable that some alterations must be made. Thus, amendments of the Federal Constitution were required to abolish slavery, to authorize a federal income tax, the election of senators by popular vote and nation-wide prohibition of intoxicating liquors. Future amendments are inevitable. The changed methods of production and transportation and communication have produced a condition of interdependency which makes the most vigorous champion of States' Rights realize that the activities of the Federal Government must continue to develop and a centralization of power occur which to the Americans of Washington's time would have been highly obnoxious and entirely contrary to their views as to state sovereignty.

The Constitution contains provisions based upon certain fundamental truths concerning the relations existing between the citizens and their government. These truths, some of which will be discussed later, are immutable

and cannot be ignored nor even tampered with, if individual liberty is to be preserved. The fact that new times, or conditions may justify or require amendments to those provisions which relate to mere details of procedure, does not justify sweeping condemnation of our government.

Those who indulge in such condemnation fail to realize how well the constitution protects the very liberty they exercise, and how its maintenance has produced so large a measure of democracy, of equal opportunity, of individual liberty and happiness that they accept those benefits as matters of course, and forget the appalling cruelty and tyranny of other and older governments; of governments exercising arbitrary powers which the American people determined should never be exercised in the United States.

The founders of the American Government sought by embodying, in the fundamental written law, the great underlying principles of individual liberty, for which the Revolution was fought, and by prescribing

the limitations to be observed by the Government itself, to secure for each individual his natural right to life, liberty and happiness.

II

REASONS FOR A WRITTEN CONSTITUTION

AFTER the Revolution came the great question of the form of government and how the principles of the Declaration of Independence could be made effective and enduring. This was sought to be done through written constitutions, enacted by the direct vote of the people themselves, and which could be changed or altered only by the people.

A "Constitution," as we use that word with reference to civil government, means the framework, the fundamental, organic law of a Nation or of a State. It has also been defined as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." [1]

A Constitution may be written and definite, as in the United States, or it may be unwritten

[1] Cooley's Const. Lim. 7th Ed., p. 4.

and consist of ancient principles and usages as in England. The great difference is that when a written Constitution is adopted by the people in their sovereign capacity as electors, it can be changed only by the people; it is as binding upon the departments and officers of the government as upon the individual citizen.

A Constitutional form of government is possible under a monarchy as well as in a republic, and may be good or bad, depending upon the terms of the Constitution.

After the recognition of their independence, each of the American Colonies became a separate and independent State, and gradually each adopted a written Constitution, providing for a republican form of government, defining how and to what extent governmental powers should be exercised, and containing specific provisions for the protection of individual liberty. Then, as each succeeding State was organized, the people thereof likewise adopted a written constitution, so that there are now in the United States forty-eight state constitu-

tions. In their basic and fundamental principles they all agree, each providing for a republican form of government, for three governmental departments, and each containing what is called a "Bill of Rights," intended for the protection of the individual against the exercise of arbitrary power by the government of any of its officers or agents.

At first the States attempted to cooperate under Articles of Confederation. This method was inadequate and unsatisfactory in many respects; the semblance of government operated on states and not on individuals; the delegates might deliberate but "could neither raise a revenue nor preserve order." [2] Finally, in 1787, the Constitution of the United States was adopted, which established our Federal Government, giving us now one Federal and forty-eight State Constitutions.

Taken together, the Federal and State Constitutions form an harmonious whole and

[2] Madison, the Constructive Statesman, Fisk.

constitute the organic law of our government, both State and Federal, in its entirety. They constitute our system of government, and when the term "Constitution" is hereafter used, it may be understood as meaning the American System of Law and Justice, prevailing in each State, and defined in either the Federal or State organic law, or in both. In this work, distinctions between the respective domains of state and nation will be ignored as far as possible, as it is not intended to do more than discuss general fundamental principles.

Somewhere in every government there is supreme power. In the United States this final and supreme power is with the people. To again quote a high authority:

> In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States, it resides in the people themselves as an organized body politic.[3]

[3] Cooley's Const. Lim. 7th Ed., p. 241.

Our presidents, congressmen, governors, judges, legislators and other public officers are the persons whom the people select to carry out their wishes.

Since it is necessary to have these governmental agents, written constitutions have been adopted for the purpose of preventing them, whoever they may be, from acting in an arbitrary or tyrannical manner. In effect, the people say: We must have public officers to exercise governmental powers, but by definite written commands and instructions we will so limit those officers in the exercise of their powers that free government and the natural rights of each individual will be protected. And the Constitution adopted upon this theory has been truly described as "the greatest contribution of the American people to the art of government."

In England what is called the British Constitution is a mass of customs, traditions and usages—not a written organic law adopted by the people themselves. The Parliament of England is supreme. It acts as a perma-

nent Constitutional Convention.[4] It may change, and it often has changed the Constitution of that country. If to-morrow it abolished the right of trial by jury, or made it a crime to believe in the Trinity, or denied the right of suffrage to the Jews, there would be no power to set such laws aside, while in America the citizen would invoke the written Constitution in which the people, the ultimate power, had forbidden the enactment of laws of that character.

The Constitution does not contain many details, but is the general frame or outline of the government. "Its nature, therefore, requires, that only its great outlines should be marked." [5] Its provisions are much more general than are those of a law enacted by Congress or the legislature of a state. Those laws are called statutes and are valid and enforceable if they are in harmony with the Constitution. If a legislative or statutory law is not in harmony with the higher or fundamental law, then its enactment was

[4] Twining *v.* State of New Jersey, 211 U. S. 78.
[5] M'Culloch *v.* State of Maryland, 4 Wheaton (U. S.) 316.

beyond the power which the people by the Constitution granted to the legislature, and the statute is void and no one can be compelled to obey it. When an enactment of Congress or of a legislature thus violates the fundamental law, it is plain that the representatives of the people have exceeded their authority and the enactment is said to be unconstitutional. This does not mean that a new or novel law is unconstitutional solely because it is novel. New conditions require new laws, and, as conditions are constantly changing, new laws are constantly appearing.

Every government possesses, in one form or another, what is known as the "Police Power," that is, it has the right and it is its duty to legislate as may be necessary to protect the peace, health and prosperity of the people. Each State of the Union possesses this power and the United States government exercises similar power in connection with those matters of public concern which have been placed within its jurisdiction.[6] The

[6] Hamilton *v.* Kentucky, etc., 251 U. S. 146.

extent of this power and its recent manifestations will be more fully discussed in another chapter.

We read in the Declaration of Independence:

> that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
>
> . . . . .
>
> to secure these rights, Governments are instituted among Men.

That is to say, the only reason we consent to human government at all is to secure our right to "life, liberty and the pursuit of happiness." A republic or a democracy may be, and often has been, as indifferent to the liberty of the individual as the most autocratic ruler could be. Unless definite bounds are placed for the exercise of governmental power, who can say to what lengths might go a faction or party strong in control? The negro slaves in the Southern states lived in a republic and still were slaves.

It is not sufficient, therefore, to say we have a republican form of government or that we live in a democracy; we must go further and determine whether its framework and fundamental principles protect the natural and rightful liberty of every individual.

III

EUROPEAN CONDITIONS IMMEDIATELY PRIOR TO THE AMERICAN REVOLUTION

IN the year 1215 the barons and bishops of England forced from King John a statement of public and individual rights called the "Magna Carta," or "Great Charter." It was a magnificent pronouncement, containing many of the principles of individual liberty enunciated in our Constitution. Unfortunately, there was no direct way of enforcing those of its provisions which were designed to restrain arbitrary action by the Crown, and King John, immediately after its promulgation, and each king succeeding him, habitually disregarded them.

In England, just about the time of the discovery of America, the power and prerogatives of the King began to grow at the expense of the liberty of the people, and the

history of England and of nearly all the countries of the Old World, during the sixteenth, seventeenth and eighteenth centuries, is a story of tyranny and opression.

It was after the discovery of America that the claim of European kings to rule by divine right was inaugurated and reached its highest development, so that in speaking of the evils which sprung from that doctrine, we are not describing conditions during the Middle Ages, but of the period commencing with the Sixteenth Century.

In England the prerogative of the Crown was greatly extended by Henry VIII. He was born just one year before the first voyage of Columbus, and reigned as king from 1502 until 1547, but the theory of "Divine Right" did not reach its full strength until the reign of James I (1604-1625). James was succeeded by Charles I, who was ambitious, tyrannical and unscrupulous. During his reign, Star Chamber trials became an appalling evil and a means of inflicting tyranny and injustice.[1]

[1] Macaulay's History of England, Vol. 1.

The Star Chamber as developed under the doctrine of divine right was a special tribunal composed of judges arbitrarily selected by the king. It had no regular forms of procedure. Its methods were secret. It was governed by no law except the will of the King, so that it was simply an instrumentality, having some of the forms of law and used for the destruction of individual liberty.

Members of Parliament who refused to vote as ordered by the King, those who refused unjust and exorbitant demands for money, in short, all who incurred the King's enmity, were thrown into prison upon various pretexts, held for years without trial, and finally, if the pretense of trial was given to them, it was secret, and simply registered the King's will. Hallam, speaking of this tribunal under James I, says:

> The unconstitutional and usurped authority of the star-chamber overrode every personal right, though an assembled parliament might assert its general privileges. Several remarkable instances in history illustrate its tyranny and contempt of all known laws and liberties. Two puritans, having been committed by the high commission court for

refusing the oath ex officio, employed Mr. Fuller, a bencher of Gray's Inn, to move for their habeas corpus; which he did on the ground that the high commissioners were not empowered to commit any of his majesty's subjects to prison. This being reckoned a heinous offence, he was himself committed, at Bancroft's instigation (whether by the king's personal warrant, or that of the council-board, does not appear), and lay in jail to the day of his death; the archbishop constantly opposing his discharge, for which he petitioned. Whitelock, a barrister and afterwards a judge, was brought before the star-chamber on the charge of having given a private opinion to his client, that a certain commission issued by the crown was illegal. This was said to be a high contempt and slander of the king's prerogative. But, after a speech from Bacon in aggravation of this offence, the delinquent was discharged on a humble submission. Such, too, was the fate of a more distinguished person on a still more preposterous accusation. Selden, in his History of Tithes, had indirectly weakened the claim of divine right, which the high-church faction pretended, and had attacked the argument from prescription, deriving their legal institution from the age of Charlemagne, or even a later era. Not content with letting loose on him some stanch, polemical writers, the bishops prevailed on James to summon the author before the council. This proceeding is as much the disgrace of England as that against Galileo nearly at the same time is of Italy

Selden, like the great Florentine astronomer, bent to the rod of power, and made rather too submissive an apology for entering on this purely historical discussion.[2]

Subjecting unfortunate men and women to torture, either as a punishment for crime or as a means for securing confessions from them, had been practiced on the continent of Europe from the earliest times. It was resorted to under the Roman law before the Christian era, and continued to be used until comparatively recent times. In England the application of torture as a part of the legal criminal procedure seems to have developed coincidently with the doctrine of divine right, and while it was prohibited by the Magna Carta, and there were always lawyers who, like Sir Edward Coke, declared that to torture those accused of crime never was and never could be legal under the law of England, the irresponsibility of the star-chamber, and the arbitrary power exercised by the Crown resulted in torture being applied in

[2] Hallam's Const. Hist. of England, I, p. 343.

England as a regular part of the machinery of the state.[3]

Playfully pet names were given the instruments used for this purpose, such for instance as "The Duke of Exeter's daughter," "The scavenger's daughter," the cell of "Little Ease."[4] One writer of Elizabeth's time, seeking to excuse or minimize the practice, said of a particular victim, he "was never so racked but that he was perfectly able to walk and to write."[5]

During the same period in France there developed a practice by which men were imprisoned under what was known as *"lettres de cachet,"* or "closed letters," an arbitrary order directing that so-and-so be imprisoned during the pleasure of the king. No trial was provided for, no appeal was possible, no publicity was given to the accusation or to the fact of imprisonment, and under this system men and women dropped out of sight

[3] The Puritan in England, Holland and America, 4th Ed., 307; History of Criminal Law in England, Stephens, Vol. 1, 221; Hallam's Constitutional History, Vol. 1, 154.

[4] History of Crime in England; Pike, Vol. 2, p. 87.

[5] Hallam's Const. History, Vol. 1, p. 156.

and were never heard of again. The system was sufficiently appalling when used exclusively by the king, but the practice became prevalent of granting to favorites of the king *"lettres de cachet"* with the name of the victim left blank, and these were used for the purpose of private revenge or oppression.

To us who have grown up under the protection of, and with the liberty guaranteed by the Constitution, it seems incredible that this practice was not abolished in France until about the year 1790, or fourteen years after our Declaration of Independence; but when we reflect that the claim to rule by divine right has been advanced in our own day and generation by the former Kaiser of Germany, we realize that democracy and individual liberty still require safeguards, and that the founders of this Republic were right when they adopted as their maxim "Eternal vigilance is the price of liberty."

In earlier centuries of the Christian era, mankind was divided into clans and tribes. Nations had not become cohesive and strong,

and, while tyranny and oppression existed and factional strife and petty wars were frequent, conditions were softened by a sort of rude democracy and tribal comradeship and further by the efforts of the Christian Church which labored unceasingly to restrain the cruelty and cupidity of the mighty.[6]

With the advent of strong and well defined nations came a powerful and well organized ruling class headed by the king or emperor wielding despotic powers and advancing claims to rule by divine right, which would not have been tolerated in the middle ages.[7]

Speaking of conditions in France, Frederick Harrison said:

A fearful picture of that desolation has been drawn for us by our economist, Arthur Young, in 1787, 1788, 1789. Everyone is familiar with the dreadful passages wherein he speaks of haggard men and women, wearily tilling the soil, sustained on black bread, roots and water, and living in smoky hovels without windows; of the wilderness presented by the estates of absent grandees; of the infinite tolls, dues, taxes and impositions, of the cruel punishments on smugglers, on the dealers in contra-

[6] The Meaning of History, Harrison, pp. 65-67.
[7] Macaulay's England, Vol. 1, p. 32:75.

band salt, on poachers and deserters . . . Men were imprisoned by *lettres de cachet* by the thousand.[8]

This same historian described conditions upon the continent of Europe generally as equally barbarous:

Over the continent of Europe down to 1789, the proprietary *jure divino* theory of privilege existed in full force, except in some petty republics, which were of slight practical consequence.[9]

The Americans of Revolutionary days knew of these conditions in Europe. They fully realized and appreciated the liberty they enjoyed in the New World, and how easily it might be taken from them by the exercise of arbitrary power by rulers or public officers.

They or their immediate ancestors had come to America in search of liberty. Stories were current amongst them of fathers or grandfathers who had endured sufferings and wrongs at the hands of tyrants. They

[8] The Meaning of History, Harrison, p. 186.
[9] The Meaning of History, Harrison, p. 190. The Bastile, Bingham.

were not like us who, after more than a century of liberty, can scarcely vision other conditions.

It was not necessary for those Americans to search history for evidences of the abuse of arbitrary powers. Amongst the grievances which in the Declaration of Independence they recited against George III, were the following:

> He has obstructed the Administration of justice by refusing his Assent to laws for establishing Judiciary Powers.
>
> He has made judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries. . . .
>
> For depriving us in many cases, of the benefits of Trial by Jury.
>
> For transporting us beyond Seas to be tried for pretended offences.

They knew and had experienced tyranny and when they came to form their own government, they determined, by the adoption of written Constitutions—which no public servant, governor, judge or legislator could

ignore or change—to so divide and limit the exercise of Governmental powers that each individual would be protected in his natural right to true liberty.

IV

ARBITRARY POWER WITHHELD

SOME one has wittily said that the only man who does not abuse, that is, misuse, arbitrary power is he who does not possess it. The men who founded this government wisely sought how best to withhold excessive and arbitrary powers from public office.

The first check adopted was to divide government into three departments, legislative, executive and judicial, each being prohibited from exercising any of the powers belonging to either of the others.

Congress for the nation, and the legislatures in the respective states have the law-making power.

It is the duty of the President of the United States and the Governors and other executive officers of the different states, to execute and enforce the laws. They constitute the Executive Department.

The Courts construe and apply the laws and constitute the Judicial Department.

Thus no one man nor any one department has complete power. The legislature which makes the law must depend upon the executive to enforce it, and the executive, in seeking to enforce the law, must invoke the aid of the judiciary.

In addition, the Constitution has many provisions for the protection of the individual which will be discussed in a later chapter, but even without these, the placing of the powers of government in three separate departments, each independent of the others, each limited in the scope of its powers, and more or less responsible to the others for the proper performance of its duties, creates a balance, and places a restraint upon official conduct which makes arbitrary action almost impossible.

If a legislature in enacting a statute, disregards the limits set by the people, the courts will refuse to enforce the law it enacts. If a judge acts corruptly, the legislature may impeach him, and the same is

true if an executive fails to obey a valid law. If the executive or the court puts a construction upon a law which the legislature did not intend it to have, the next legislature may repeal the law or limit its operation as originally intended.

An independent judiciary has always been a guaranty of liberty. In countries where judges are appointed to serve only during the will of the appointing power, and are removable at its pleasure, tyranny is inevitable, for one who holds his office at the will of another must obey that other's commands. With us, a judge, when elected or appointed, is absolutely independent, and so long as he is honest and just, need fear neither the executive nor the legislature.

Instances like the foregoing might be multiplied almost indefinitely, each illustrating the fact that the division of the powers of government prevents arbitrary action and, therefore, protects the liberty of each individual citizen.

V

SAFEGUARDING INDIVIDUAL LIBERTY

WHILE most of the guarantees of personal liberty found in the Federal Constitution are designed to protect the individual citizen against the arbitrary exercise of Federal power, practically identical provisions are contained in each of the state constitutions. It will be proper, therefore, to first refer to some of the provisions of the Constitution of the United States, designed to prevent arbitrary action by the government or any of its officers or agents.

It will not be attempted to give all such provisions but only the following as sufficient to show that the founders of this government sought and did provide for the protection of each individual in his natural rights be-

fore the law and further to show that this lofty and beneficent purpose has been accomplished.

(A)

The Privilege of the Writ of Habeas Corpus Shall Not be Suspended, Unless When in Cases of Rebellion or Invasion the Public Safety May Require it.[1]

A "writ" is a written order or command, issued by or under the authority of a court. The writ of habeas corpus is an order and command that the person named in the writ shall be physically brought into court, so that the judge may publicly inquire into the grounds for or cause of his imprisonment. The writ of habeas corpus is a writ of right —that is, the court cannot refuse to issue it.

It is not necessary that the person who is imprisoned should make the application. Any person may do so upon behalf of the prisoner. It is a summary proceeding and the one imprisoned must be at once brought in person before the court.

[1] Const. U. S., Art. I, § 9.

(B)

No Bill of Attainder or Expost Facto Law Shall be Passed.[2]

A bill of attainder is a special law affecting a particular individual and which forfeits his property and makes it impossible for any right or property to pass by inheritance to, from or through him.[3] Bills of attainder were very common in England during the factional strife which began with the War of the Roses.

An ex post facto law is one which, after an act has been committed, declares it to be a crime, punishable as such although at the time of its commission it was not unlawful.

Under the common law of England the conviction of a felony "attainted" the one so convicted. This was part of the punishment for crime and followed a due conviction in a court of justice, but a bill of attainder means a legislative finding of guilt and if ex post facto laws are permissible this legisla-

[2] Const. U. S., Art. 1, § 9.
[3] Bouvier's Law Dictionary, Rawle's Ed., 278.

tive finding of guilt may be for an act which when it was actually committed, violated no law then in existence. A leading English law writer stated this:

> There is also another mode of attainder, which has been sometimes exerted on great and perilous occasions, when the ordinary mode of justice would not insure the public safety; this is, the attainting of state criminals by act of parliament. The attainder of Sir John Fenwick, for conspiring against William the Third, is one of the most remarkable instances of the kind in our history; but, just before he was tried for high treason, the act had been passed, requiring two witnesses to every indictment for that offence. On his trial, only one witness could be produced against him, and, therefore, it was found impossible to procure a conviction. To supply this defect, a bill of attainder was brought into parliament, which, after a great opposition, passed, and the defendant was attainted and executed.[4]

A full account of this proceeding which resulted in the beheading of the victim, is contained in Volume XIII, Howell's State Trials, 538.

In Vol. I, Cobbett's State Trials, 482, is found a summary taken from Burnett's His-

[4] Chitty's Criminal Law, 4th Am. Ed., 723.

tory of similar parliamentary proceedings during the reign of Henry VIII. After giving a long list of persons so convicted and executed, the account describes one bill as follows:

> Thus sixteen persons were in this manner attainted, and if there was any examination of witnesses for convicting them, it was either in the Star Chamber or before the privy council; for there is no mention of any evidence that was brought in the Journals: there was also much haste made in the passing of this bill: it being brought in the 10th day of May was read that day for the first and second times and the 11th of May for the third time. The commons kept it five days before they sent it back, and added some more to those that were in the bill first; but how many were named in the bill originally, and how many were afterwards added, cannot be known.

It is readily understood why, in the light of this history, it was determined the Constitution should prohibit such practices, but, it may be asked, do we require any such safeguard now? Are not all such barbarous acts impossible in modern times? These questions can be answered by citing a comparatively modern instance.

After the Civil War, while men's passions were fiercely aroused and factions were bitter, the people of Missouri adopted a constitution disfranchising and driving from their callings and professions those who refused to take a test oath as to their past conduct. The enactment came before the Supreme Court of the United States, and it was there held to be in effect a bill of attainder and ex post facto law, repugnant to the Constitution, and void.[5]

This occurred during the life time of many now living, and is a demonstration of the necessity of maintaining all safeguards of liberty.

(C)

THE JUDGES, BOTH OF THE SUPREME AND INFERIOR COURTS, SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR AND SHALL, AT STATED TIMES, RECEIVE FOR THEIR SERVICES, A COMPENSATION, WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE.[6]

One of the charges of tyranny made

[5] Cummings *v.* State of Missouri, 71 U. S. 277.
[6] Const. U. S., Art. 3, § 1.

against George III in the Declaration of Independence was: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," and to secure an independent judiciary, the Constitution fixed the tenure of office and forbade reduction in compensation.

The importance of an independent and fearless judiciary cannot be overstated. During the period preceding the American Revolution, it was through the subserviency of the judges that the crown was able to be arbitrary. Hallam in his Constitutional History of England gives instance after instance of corruption, cowardice and subserviency among the judges. The law was constantly bent and warped to suit the desires of the king. An appalling picture of this same condition will be found in Macaulay's Essay on Lord Bacon. Those judges cringed to the powerful and bullied the weak; they tortured the helpless, and "hung the guiltless sooner than eat their mutton cold."

(D)

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED. . . .[7]

To obtain the right to search an American home the officer must file a written complaint with a magistrate, and obtain a search warrant, which will be issued only upon a showing that there is probable cause to believe that something to which the law officer is entitled is being concealed in the building to be searched.

This provision of the Constitution should be read in connection with the Fifth Amendment, which provides, among other things, that no person "shall be compelled in any Criminal Case to be a witness against himself," and the Supreme Court of the United States has decided that to compel one charged with a criminal offense to produce his books and papers is a violation of the provision.[8]

[7] Const. U. S., IV Amendment.
[8] Boyd *v.* U. S., 116 U. S. 616.
Silverthorne Lumber Co. *v.* United States, 40 Sup. Ct. 182.

A most interesting and instructive historical review of this important question was given by Mr. Justice Moody, in a case decided by the Supreme Court in 1908.[9]

This system should be compared with the practice of subjecting to torture, persons suspected of crime. History shows that many unfortunates were, by such methods, driven into confessing guilt, where none in fact existed; these provisions for the protection of the citizen against arbitrary action prevent any such inhuman practice in the United States.

(E)

In all Criminal Prosecutions, the Accused Shall Enjoy the Right to a Speedy and Public Trial, by an Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed . . . to be Informed of the Nature and Cause of the Accusation; to be Confronted With the Witnesses Against Him; to Have Compulsory Process for Obtaining Witnesses in His Favor, and to Have the Assistance of Counsel for His Defense.[10]

Thus was prevented the possibility of star

[9] Twining *v.* State of New Jersey, 211 U. S. 78.
[10] Const. U. S., VI Amendment.

chamber trials, long imprisonment without trial, or imprisonment under anything resembling the "closed letter" of France.

In the United States we have seen even the creature guilty of assassinating a president of the Republic, furnished at public expense with counsel for his defense.

(F)

EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED.[11]

Amongst other acts of barbarism perpetrated in the name of law, the Americans of the eighteenth century may have had in mind the sentence passed upon Sir Walter Raleigh in the Seventeenth Century. Raleigh's career must have had a special interest for the American Colonists, for he had been in the New World more than once. When he fell under the displeasure of the King and was convicted of treason, the following was his sentence.

[11] Const. U. S. VIII Amendment.

That you shall be had from hence to the place whence you came, there to remain until the day of execution; and from thence you shall be drawn upon a hurdle through the open streets to the place of execution, there to be hanged and cut down alive, and your body shall be opened, your heart and bowels plucked out, and your privy members cut off, and thrown into the fire before your eyes; then your head to be stricken off from your body, and your body shall be divided into four quarters, to be disposed of at the king's pleasure; And God have mercy upon your soul.[12]

Raleigh was afterwards released and given a piratical commission by the king; but after fifteen years he again fell into disfavor, and without any new trial, the old sentence of death was ordered to be executed, but modified so as to exclude the horrible details except the removal of the head from the body. This was done; the head exhibited and then disposed of, presumably at the king's pleasure.

Macaulay describes the pleasure with which the infamous Jeffreys imposed similar sentences.[13] Indeed, sentences of this char-

[12] Cobbett's State Trials, Vol. 2.
[13] Macaulay's England, Vol. 1.

acter were pronounced in England as late as 1848, but were not actually carried into execution.[14]

(G)

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF. . . .[15]

At the time of the Revolution, religious liberty was not as well understood, even in America, as it is to-day, but in 1787, when the Federal Constitution came before the States for adoption, the people at least realized that they wanted no state religion established by Congress, and that the form of religion to be exercised was a matter of individual liberty, to which each citizen was entitled. With this principle incorporated in the Federal Constitution, the States soon fell in line, and religious liberty, as we now understand it, became universal throughout America.

America to-day is the only nation large

[14] History of Our Own Times, McCarthy, Vol. 1.
[15] Const. U. S., I Amendment.

enough to be classed as a world power in which true religious liberty exists. In England a Catholic cannot be king. In Spain, a Protestant cannot. In France, Russia and Germany religion is still a thing to quarrel over.

In this, as in so many other instances, the establishment of the correct principle has had a very powerful effect upon the mentality of the American people.

Having accepted as a truth each one's right to worship God according to the dictates of his conscience, we have come to cease hating or distrusting men because of their religious belief. Adherents of different faiths join with one another in promoting the public good.

In other lands and in other times religion was used by misguided or designing men to precipitate great wars or secure political advantages. In America, under the protection of the written constitutions guaranteeing liberty of conscience, religious prejudice, as a party cry, has become so faint as to merit only contempt.

(H)

. . . Nor Shall Any State Deprive Any Person of Life, Liberty, or Property, Without Due Process of Law; Nor Deny to Any Person Within Its Jurisdiction the Equal Protection of the Laws.[16]

This is one of the provisions of the Fourteenth Amendment to the Federal Constitution, adopted after the Civil War. It affords protection to the citizen against arbitrary acts or laws by a state and will be considered more in detail hereafter.

The foregoing are excerpts from the Federal Constitution as it is to-day, and are found in substance in each of the State Constitutions as well. There are, however, many matters of purely state concern, over which jurisdiction has not been ceded to the Federal Government. Those matters are under the exclusive control of the states. Many of them have a very important bearing upon the prosperity, happiness,and progress of the people, and should be referred to.

[16] Const. U. S., XIV Amendment.

VI

ADDITIONAL SAFEGUARDS FOUND IN STATE CONSTITUTIONS

IT would serve no useful purpose to examine the Constitutions of each of the different states, as upon the matters discussed in this work, they are in practical agreement. In addition to those referred to in the preceding chapter, the following provisions contained in the Constitution of Minnesota have been selected as illustrating the regard for the individual which permeates our entire system of government.

(A)

No Person Shall be Imprisoned for Debt in This State. . . . A Reasonable Amount of Property Shall be Exempt From Seizure or Sale for the Payment of Any Debt or Liability. . . .[1]

[1] Const. Minnesota, Art. 1, § 12.

Imprisonment for debt is a form of harsh cruelty practiced quite generally until recently, and still allowed in some countries. Under it a debtor could be imprisoned until the debt was paid. These prisons were filthy holes; the prisoners were compelled to support themselves, and sometimes whole families were confined there. The practice was in existence in America even after the Revolution. Robert Morris, who signed the Declaration, and is described as the Financier of the American Revolution, subsequently met with severe business disasters, and spent some years in a debtor's prison. Some of our states still have proceedings bearing altogether too close a resemblance to this barbarity. However, we have a National Bankruptcy Act, and no honest man need fear imprisonment for mere debt. Graphic accounts of the horrors of the old system appear in the writings of Dickens [2] and Thackeray.[3]

In this connection it is proper to refer to

[2] Pickwick Papers. Little Dorrit.
[3] Pendennis.

the act of Congress prohibiting peonage. The law was enacted under the authority of the Thirteenth Amendment to the Federal Constitution.

Peonage is defined as "a status or condition of compulsory service based upon the indebtedness of the peon to the master." Construing this law, the Supreme Court of the United States said:

> We entertain no doubt of the validity of this legislation, or its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly upon every citizen of the Republic, wherever his residence may be.[4]

(B)

ALL ELECTIONS SHALL BE BY BALLOT, EXCEPT FOR SUCH TOWN OFFICERS AS MAY BE DIRECTED BY LAW TO BE OTHERWISE CHOSEN.[5]

Of this provision, the Supreme Court of Minnesota said:

> Voting by ballot signifies a mode of designating

[4] Clyatt *v.* United States, 197 U. S. 207, 218.
[5] Const. Minnesota, Art. VII, § 6.

an elector's choice of a person for an office by the deposit of a ticket, bearing the name of such person, in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for. This privilege of secrecy may properly be regarded as the distinguishing feature of ballot voting, as compared with open voting, as, for instance, voting *viva voce*. The object of the privilege is the independence of the voter.[6]

Mr. Douglas Campbell, in his great work, "The Puritan in Holland, England and America," says:

. . . A secret ballot is the safeguard of republican institutions. Where votes for public officers are given *viva voce,* or in any other manner which permits one person to learn how another has voted, there can be no real freedom of elections. This principle is now so well understood that it seems an axiom in politics, and yet it was not until the year 1872 that voting by ballot was introduced into the Mother Country. Until that time all municipal elections, and all elections for members of Parliament were conducted by show of hands or oral declarations, after the primitive fashion of rude nations, the feudal chieftain, the landlord or employer being en-

[6] Brisbin *v.* Cleary, 26 Minn. 107, 108.

abled to see whether his henchman, tenant or employe was voting for the candidate of his selection.[7]

Later in the same work, the author returns to the subject and gives a most interesting history of ballot elections.[8]

Because of its early and general use and its incorporation into the fundamental law, election by secret ballot may be called a distinctive American doctrine, and should never be impaired if we are to continue to have free elections.

Allowing absentees, upon the ground of convenience to vote by mail or by any means other than personally appearing at the voting booths, is the beginning of the surrender of the secret ballot, and the end of free elections, for such methods will inevitably result in frauds and coercion of voters. This will be particularly true in large congested centers amidst a dense and ignorant electorate.

(C)

ALL LANDS WITHIN THIS STATE ARE DE-

[7] The Puritan in Holland, England and America, Vol. 1, p. 52.

[8] Ib., Vol. 2, p. 430.

CLARED TO BE ALLODIAL, AND FEUDAL TENURES OF EVERY DESCRIPTION, WITH ALL THEIR INCIDENTS, ARE PROHIBITED. LEASES AND GRANTS OF AGRICULTURAL LAND FOR A LONGER PERIOD THAN TWENTY-ONE YEARS, HEREAFTER MADE, IN WHICH SHALL BE RESERVED ANY RENT OR SERVICE OF ANY KIND, SHALL BE VOID.[9]

The term "alodium" is defined to be "an estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof." [10]

That is to say, the person holding title to land is the real owner. He is in truth a freeholder, and owes no service or duty to anyone else, because of his occupancy, use or ownership of the land.

"Tenure" refers to the character of one's title or to the terms on which he holds possession or title, and "feudal tenure" is the term used to describe a system at one time existing in Europe, in which it was the law, that all the land in a nation actually belonged to the king, and that all those below him occupying the land were only his tenants, and

[9] Const. Minnesota, Art. I, § 15.
[10] Bouvier's Law Dictionary, Rawle's ed. 183.

owed to him some form of service in exchange for the privilege of occupation.

For in the law of England we have not, properly, *allodium,* that is, any subjects land that is not as it is holden; unless you will take *allodium* for *ex solido,* often taken in the Booke of Domesday: and tenants in fee simple are there called *alodarii* or *aloarii.* And he (the holder of the fee simple title) is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a tenant, because he hath no superior but God Almighty. . . .[11]

The happiness, prosperity and independence of a people will largely depend upon the character of the laws relating to land, for land is, after all, the great ultimate source of wealth.

Feudal tenures were invented by armed conquerors to strengthen their arms and concentrate their powers.

The system was established in continental Europe after the fall of the Roman Empire and, upon the Norman conquest of England in the Eleventh Century, was extended to

[11] Coke upon Littleton, Book 1, First Part, Ch. 1, § 1.

that country and continued in full vigor until about the reign of Charles II in the Seventeenth Century.

The system was essentially military in its origin and characteristic, and was based upon the theory that the actual title to all the land of the kingdom was held by the king, who granted such portions as he saw fit to the barons or other nobles, upon condition that they support the king in his military enterprises. A baron, in turn, allotted portions of the lands to men in lower grades of the social order, upon condition that they, in turn, support him in his warfare. This smaller tenant again subdivided his holdings amongst the mere serfs or peasants, who gave in return what was considered the lowest form of service, agricultural labor.

When one of these peasants was given the privilege of tilling and occupying a few acres, he was required to do homage thus:

> For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shal kneele before him on both his knees, and hold his hands joyntly

together betweene the hands of his lord, and shall say thus: I become your man (*Jeo deveigne vostre home*) from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithful, and beare to you faith for tenements that I claime to hold of you, saving the faith that I owe unto our sovereigne lord the king; and then the lord so sitting shall kisse him.[12]

Among the evils resulting from this practice were; first, a system of peonage or slavery under which the common people were practically chattels attached to the land; second, the immense concentration of land in the hands of a few individuals; third, a recognition of the claim that all those below the king practically held their lands upon sufferance; and, finally, a huge military system which confined the holding of lands to those who could bear arms.

Although gradually there developed a method for permitting the heirs of a deceased person to inherit the lands held by him these heirs were necessarily confined to male heirs and generally to the eldest son.

[12] Coke upon Littleton, Book 2, First Part, Ch. 1, §85.

It was natural that women should be excluded from the inheritance and that the rule of primogeniture, a system giving all the inheritance to the eldest son, should prevail because the basis of the whole system was military and the sole reason for its existence was for strength in war and a concentration of power.

With such a theory and system of land titles, extortion by the strong from the weak became the rule. Payments had to be made in order to obtain the consent of the overlord to a conveyance, or to an inheritance. By right of his position the overlord became the guardian of minors and exercised extraordinary powers over them, even to the extent of determining whom female wards might marry, and only on condition that the marriage was one which would increase the military strength of the overlord was this permission granted.

Feudal tenures have been abolished in Europe but many of the evils produced by the system remain. In England great estates are still intact. The eldest son is given a

preference over his brothers and sisters. The people are divided into classes, sharp distinctions existing between the different social orders, and it is only within a comparatively recent period that the natural right of every citizen to have some share in shaping the government has been recognized.

There are many other constitutional provisions which would necessarily be described in any complete study of the American government. Amongst those are the provisions guaranteeing a free press, free speech, the right of assemblage, the right to bear arms, and the superiority of civil to military government. There are also the provisions relating to public officers, the creation of courts, legislatures, and executive departments, and the methods to be followed by them in the performance of their duties.

There is also the large and highly important subject of the respective domains for state and federal governments.

A comprehensive discussion of each of those subjects would be out of place in this work in which it is only attempted to give a

short summary of the American Government as a whole, without unnecessary detail or close or subtle distinctions and to point out as briefly and simply as possible what Americans understand to be a republican form of government, controlled by a written constitution, and to suggest some of the most obvious reasons why it was believed the rightful liberty and prosperity of the individual could best be secured by thus limiting the exercise of governmental power.

It would seem, that, for this purpose, enough has been said to show how completely the Constitution guards individual liberty; how fully it safeguards the rights of private property. It now becomes pertinent to inquire whether these provisions prevent progress. Has our Legislative Department sufficient freedom under this rigid Constitution to legislate as may become necessary to meet new and changed conditions of life and production? The right to so legislate is called the "Police Power." Its extent and exercise will be now discussed.

VII

THE POLICE POWER

THE "Police Power" is a term which has been adopted to designate the reserved and inherent power, which every government possesses, to control the social and moral conduct of the people subject to it, and to regulate the use of property and property rights within its jurisdiction. It does not deal exclusively with crime, as that term is usually understood, nor criminal procedure. Anti-trust laws, the regulation of railroads, telegraph and telephone companies, child labor, pure food and all similar laws are illustrations of the exercise of the police power. Indeed, the term has come to be used almost exclusively to describe a class of laws in connection with which the "police" have ordinarily no duties.

While the general power is broad enough to include all laws governing human conduct,

the term "police power" is now used to designate the right which a state has to regulate business and business relations between citizens.

To the student of human government there is nothing more interesting than the exercise and development of this power in America during the last fifty years.

Perhaps the best way to describe this function of government as it exists with us, is to begin with the separate states, each of which is, except as limited by the Federal Constitution, an independent sovereignty.

Sovereignty implies complete, ultimate power. In the beginning each state possessed this power and it was vested in the people who composed the state.

When the people of a State adopted a written constitution, they gave to the legislative department the full power to make laws for the conduct and government of people and property.

This grant of power was absolute except as limited by some specific provision of the Constitution itself.

The legislative, or law making power of each state had, therefore, the right to enact any law, not specifically forbidden, which in its discretion was needful.

Then came the Federal Government to which the States ceded the exclusive right to legislate upon certain specified governmental concerns.

These were of a character calculated to preserve the Union, such as the power to declare war, to regulate commerce between the States, to coin money, to punish counterfeiting, to establish post offices and post roads, to raise and support an army and navy, and similar matters.

At the same time and by the same instrument, the individual States were forbidden to enact laws or take actions of certain specified kinds which would tend to disrupt the Union.

The Federal Constitution then contains this provision:

The powers not delegated to the United States

by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.[1]

Thus there was reserved to each State this general governmental control which is called the police power, with the result that any law the legislature of a State may duly enact is valid and binding, provided only, it is not forbidden by the Federal or State Constitution, and is not of a class, the exclusive control of which has been delegated to the Government of the United States.

The Federal Government, having only the powers delegated to it by the people of the United States, does not possess the police power in the same sense and to the same extent as do the individual States, but this is a distinction which it is not necessary to analyze since where Congress has control of a subject, its power is complete and it is immaterial whether it is called the police power or not.[2]

In one case the Supreme Court of the

[1] Const. U. S., X Amendment.

[2] Hamilton *v.* Kentucky, etc., 251 U. S. 146.

United States described this right of legislation as the power which the State has

> . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[3]

It has been found somewhat difficult to define this inherent power which each State possesses. Definitions tend to limit, and manifestations of the police power change with every change in business and living conditions, and our courts have wisely confined their descriptions to very general terms.

The police power of the State is not subject to any definite limitations, it depends upon existing conditions, the necessities of the situation and what is necessary to safeguard public interests.[4]

In a comparatively recent case the Supreme Court said:

> It may be said in a general way that the police

[3] Barbier *v.* Connolly, 113 U. S. 27, 31.
[4] Camfield *v.* United States, 167 U. S. 518.

power extends to all the great public needs. . . .
It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.[5]

From its very nature this governmental power is not peculiar to America but is possessed by every government conforming in its institutions to right reason and natural law. It is not always given the somewhat technical title "Police Power" but it is universally recognized as being an attribute of every organized and efficient government.

In his famous Encyclical on Labor, Pope Leo XIII said:

The first duty, therefore, of the rulers of the state should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as to produce of themselves, public well being and private prosperity. This is the proper office of wise statesmanship and the work of the heads of the state. Now a state chiefly prospers and flourishes by morality, by well regulated family life, by respect for religion and justice, by the moderation and equal distribution of public burdens, by the progress of the arts

[5] Noble State Bank *v.* Haskell, 219 U. S. 104, 111.

and of trade, by the abundant yield of the land—by everything which makes the citizen better and happier.

So broad and comprehensive is this right of legislation which the State has, and which we call the police power, that a writer on law says:

> It is nothing more nor less than a name for the residual powers of sovereignty after the shearing off the powers of taxation and the eminent domain.[6]

This vast general power possessed by each State of the Union cannot be surrendered. It is necessary for efficient and good government and by its proper exercise progressive legislation may be enacted and new conditions provided for by new laws adapted to the changed situation. Such legislation, however, must not be arbitrary, must not break down the protection which the Constitution affords the individual to "life, liberty and the pursuit of happiness," must not destroy property rights and must not put arbitrary powers into the hands of public officers.

[6] McGehee on Due Process of Law, p. 302.

VIII

THE GOVERNMENT SHOULD BE PROGRESSIVE

MANKIND'S conception of individual rights is constantly changing, and there are always at least two extreme schools of thought,—the ultra conservative, who regard any change or novel law as a calamity, and the ultra radical, who seek to change everything and even to destroy all government. Neither extreme is right, but happily the great mass of our citizens belong to neither; and so far in America the controlling spirit, while progressive, has been thoughtful and governed by a high regard for law and order and for the natural and fundamental rights of all classes.

Since the adoption of the Constitution, tremendous changes have occurred in methods of production, transportation and manner of

living. Railroads, steam-boats, the telegraph and telephone, oil and gas and electricity for heat, light and power, the internal combustion engine, automobiles and farm tractors, harvesting and threshing machines, and innumerable other inventions and manufactures, have appeared and been first utilized since this government was founded.

The country itself has grown from a sparsely settled group of separate colonies, containing altogether less than three million people to a great industrial nation, with a population of one hundred and ten millions, and with great congested cities and manufacturing centers.

When America was a primitive country, the laws enacted by the legislatures of the respective States were principally to define and punish crime, establish courts and state institutions, regulate cities, counties and townships, and provide for public officers and their duties.

Very little regulation of business was attempted. The American people wanted laws as few and simple as possible; what they

desired was that each citizen be left free to follow his own method and inclinations. Licenses were required as a prerequisite for engaging in some few avocations, but the principal business enterprises were not controlled or regulated by any specific statutory provision.

With the new methods of production and transportation came the great corporations, and it was soon seen that a railroad was able to make conditions for the transaction of business which affected all who depended upon it. If it was free to charge what it wished and to charge different rates for the same services to different customers, the corporation owning the railroad could make or break men, as it chose.

At the same time, the changed methods of production brought about a condition in which each person came to depend more and more upon the efforts of other persons for articles of common use. Instead of lighting houses with candles of home manufacture, gas and electricity supplied by some large company are used. Instead of each com-

munity supporting a slaughter house, great packing houses exist. The farmer's wife no longer makes butter or weaves cloth or knits socks. Each individual has specialized in some line, and each depends on someone else for everything outside of that line. All this has produced a condition of inter-dependency and has made necessary to a greater extent than heretofore legislation regulating business methods and dealings so as to prevent the strong from exploiting the weak.

Men seldom take kindly to restrictions upon their liberty. It was natural that the owners and managers of large corporations and industries should resent the interference of the law, and the struggle by the Government, state and federal, to regulate, through the exercise of the police power, those lines of business which affect the public prosperity has gone on for years, but with a steady and continued advance by the Government, still acting within the limits of the Constitution and in accordance with its spirit.

An early decision of the Supreme Court of the United States was to the effect that a

corporation charter having once been granted, became a contract. The Federal Constitution forbade any State from impairing the obligations of contracts, and, therefore, the State could not, without cause, revoke the charter as, by so doing, it would impair the contract it had entered into with the corporation.[1]

Years afterwards, when, on account of changed conditions, the Government sought to control and regulate railroad and other corporations, this decision was relied upon to support a claim that when a charter was granted, the corporation organized under it was free from all legislative interference, at least as long as it did not change its business practices.

It was an audacious claim and would have been a monstrous doctrine had it received the approval of the courts. Each individual citizen is subject to the proper exercise of governmental power, and it is unthinkable that a corporation, a mere artificial person,

[1] Trustees Dartmouth College *v.* Woodward, 4 Wheaton (U. S.), 518.

should be beyond similar control. Instead of allowing this demand of corporations, the courts held, and it is now the well-settled law that there is necessarily read into and included in the charter of every corporation, the right of the State to regulate its conduct, through the proper and reasonable exercise of the police power.

The State cannot surrender its police power, and when a charter is granted to a corporation it is necessarily upon condition that the State reserves to itself the right to exercise its legitimate power over the corporation, to prescribe regulations, found necessary from time to time, to promote the well being and prosperity of the people.[2]

[2] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650.
Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677.

IX

THE CONSTITUTION REQUIRES AND INSURES INTELLIGENT PROGRESS

THE most frequent objection which is urged against laws intended to regulate business and restrain practices which are against the public welfare, is that they violate the Fourteenth Amendment to the Constitution of the United States, which forbids a State depriving any person of life, liberty or property without due process of law.

Due process of law is synonymous with the law of the land, a rule operating equally upon all within its terms. It means, when any action, civil or criminal, is taken against one, that there shall be an orderly and lawful procedure, with notice to the one proceeded against, that he shall have information as to the grounds for the procedure, and a full opportunity to be heard; that one whose life,

liberty or property is threatened shall have his day in court. It means "the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." [1]

All understand what it means to be deprived of life, but what is meant by liberty and property is not so well understood.

"Liberty" is a relative term. What might be considered reasonable and lawful in one place or under certain circumstances, might be unreasonable and unlawful under other conditions. Every member of organized society surrenders something of his individual liberty in return for the protection afforded him by the Government; each one must act with due regard for the rights and safety of others, but, subject to reasonable and proper restrictions and to the general laws of decency and morality, liberty of the citizen means not only that he should be free from physical restraint, but that each has the right to choose his place of residence, his call-

[1] Hurtado *v.* People of California, 110 U. S. 516; Chicago M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418.

ing, his food, his wearing apparel, his associates, and his manner of living.[2]

"Property" includes not only tangible and physical property, but also the right to earn, by the use of property, a fair and reasonable return. Thus, a public service corporation cannot be compelled to perform its functions at a loss. To compel it to devote its property to the public service without a reasonable return, would be to confiscate its property without compensation.

Of this the Supreme Court of the United States said:

> The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights;
>
> that all persons should be equally entitled to pursue their happiness and acquire and enjoy prop-

[2] Powell *v.* Pennsylvania, 127 U. S. 678;
Butchers' Union, etc., *v.* Crescent City, etc., 111 U. S. 746.

erty; that they should have like access to the courts. . . . that no greater burdens should be laid upon one than are laid upon others in the same calling . . . no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[3]

The development of the country through a rapidly increasing population and through new methods of transportation and production, was undoubtedly more rapid than was the development of statutory law, and more rapid than the development of the police power in the regulation of business activities. It required some time for the government to overtake commercial development, and during this period of transition many evils crept into business methods which new laws were required to correct.

[3] Barbier *v.* Connolly, 113 U. S. 27, 31.

At the time our government was established, comparatively few corporations existed, and the laws regulating their conduct were very meagre. When great transportation, insurance and banking companies were organized, they were first treated as private enterprises, and the fact that they would soon be in a position to largely affect the conditions of life for all the people was not recognized. But the power of government to legislate so as to meet new conditions, while dormant, was in full existence, and so, about the middle of the last century, there commenced in Congress and in the States, the enactment of laws intended to prevent practices in business found to be dishonest or unfair or which gave an undue advantage to any class or group of citizens. These regulations were designed to insure an equal opportunity for advancement to all citizens, as was intended by the Constitution.

Among the first to be brought under control were the transportation companies. Rates were reduced and equalized, rebates prohibited, safety appliances required, and

so on through a long list of measures and regulations, based upon the theory that the public had a direct interest which must be taken into account, in the methods, management and operation of those companies.

Then followed insurance companies. Great frauds had grown up in the management of some companies, and the long, complex contracts put out by them were so filled with unfair provisions, cunningly worded, that a policyholder generally had great difficulty in securing the payment of any loss; no matter how honestly incurred.

Many of the States now have laws defining exactly the wording of the policies which may be issued in the most important kinds of insurance. Laws are also general, requiring complete solvency of the companies, providing for an examination and inspection of their books, requiring the maintenance of a sufficient reserve, and defining the class of securities in which this reserve and the funds of the companies must be invested.

The result has been not only the protection of the public from dishonest or incompetent companies, but insurance companies themselves have been strengthened and made so safe and dependable that they have come to play a very large part in the business of the country. The laws regulating insurance are still incomplete, but a great advance has been made. Extremely strict laws have been enacted regulating banks, trust companies, building societies and other financial concerns. The pure food laws have nearly all been enacted within recent years, and there is still the problem of the proper method for the regulation of packing houses, cold storage plants and similar institutions.

Until comparatively recent years America was woefully deficient in labor legislation, and this condition requires more than passing mention.

The American citizen was and is, fundamentally, an individualist. He realizes that in the past the ordinary man suffered from too much government. He desires to be left alone and allowed to make his own way, to

work where and for whom and upon what terms he pleases.

In early days in New England, agricultural laborers were not called servants, but "help," showing the democratic relations existing between master and servant, and while this was a primitive country with its people largely engaged in agriculture, this was a natural and proper attitude. But when the population became congested, and single industries employed thousands of laborers, many of whom were foreigners, ignorant of the language of the country, and above all, when living conditions became such that women and children were being forced to hard labor, it became apparent that the original conception as to the ability of the individual to care for himself must be modified.

Following this knowledge came child welfare laws, statutes regulating hours of labor, particularly for women and children, laws providing for improved factory conditions, laws compelling the installation of safety devices, workmen's compensation acts, and

other laws for the benefit and protection of labor, of which perhaps the most significant are the minimum wage laws which are rapidly coming into vogue in different States.

It is every day becoming more apparent that the relations between capital and labor must to a great extent be regulated by statutory law, and though no one can now say what form such laws will take, we can feel assured what their general character must be.

As already said, the desire for arbitrary power is a weakness of humanity. Yielding to it will distort the soul of a poor man as well as that of a rich man. It is equally dangerous to the public good when possessed by the laborer, the mechanic, the farmer, the employer or the public official. Its power for evil is accentuated when any group of men possess and exercise it as a class.

In Europe governments were and, to a great extent still are, based on class distinctions. Hereditary monarchs, hereditary nobles, hereditary legislators, are still ruling. Class privileges, class rule and class burdens

produced the tyranny, cruelty and injustice as described in preceding chapters.

The chief aim of Americans has been to prevent class rule and class legislation. Beginning with the principle that all men are born equal, it was sought by the checks and balances adopted to abolish arbitrary power and class rule. For this reason the Federal Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." [4]

It should be well understood that arbitrary power and class rule are one and the same thing. If wealthy corporations were uncontrolled, we would have class rule by their owners. If a labor party arose and secured complete control, we would have class rule by labor. The same would be true if the farmers as a class came into exclusive control. It is entirely useless to debate which would be the least objectionable. Any one of them, if clothed with the arbitrary power

[4] Const. U. S., XIV Amendment.
Butchers' Union, etc. *v.* Crescent City, etc., 111 U. S. 746.

which complete control gives, would abuse the power and oppress the others.

This does not mean that any group of citizens may not call attention to and insist upon remedying bad conditions which press heavily upon them, but it does mean that so long as the present form of the American Government exists no one class—rich or poor, city men or farmers, will be permitted to rule to the exclusion of the others.

The power of the State which has been invoked to control business and prevent unfair methods, is equally potent, and may be used to prevent class rule.

Progressive legislation is not only possible, but inevitable, in America, for the reason that the fundamental law is based upon the natural rights of man. It is because we truly believe that all men are equal before the law that our Constitution contains those provisions which prevent the strong from exercising arbitrary power over the weak. Because of that belief it is provided that no man shall be held in prison without trial, nor secretly tried and condemned, nor denied the

right of witnesses, nor cruelly punished, nor denied free speech, nor deprived of property. Because of that belief our fundamental law guarantees free land, free elections and liberty of conscience.

The Constitution having thus recognized each individual's natural right to life, liberty and happiness, and provided the means for securing those rights, the legislative department of the government must, by the very law of its being, continue

> to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[5]

This is a very meagre statement of the development and exercise of the police power, which has taken place in America since the middle of the Nineteenth Century. The legislation is far from complete, even as to present conditions, but is amply sufficient to show that all real progress and progressive

[5] Barbier *v.* Connolly, 113 U. S. 27, 31.

legislation is not only entirely possible under our Government, but is essential to the maintenance of the principles upon which it is founded.

X

HOW THE COURTS MAINTAIN THE CONSTITUTION

THE American courts, both state and federal, exercise the right to construe and interpret the Constitution and to say whether an act of Congress or of a legislature is contrary to the fundamental law. This is a tremendously important function, and there have always been those who insisted it was a dangerous power to place under the control of the judiciary.

The opponents of this system say that judges are seldom in touch with the popular will; that they are ultra conservative; that they are almost invariably chosen from corporation lawyers, prejudiced against, or at least indifferent to, public opinion, and that their previous environment and work have unfitted them to sympathize with the people,

or to understand or appreciate the need of progressive legislation. Further, that it makes the Judicial Department superior to the two others, which is of itself, they say, contrary to the Constitution.

As to these general complaints, little need be said. Judges are usually men of mature age, and naturally careful and conservative, but it is not true that they are not in accord with established public opinion or true progress, and above everything they believe in individual liberty.

Lawyers (and judges are lawyers who have graduated) have many sins to answer for, but no one will deny their love of freedom. Edmund Burke, in his speech on conciliation, said the American Colonists were much given to the study of law and that "This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources."

A lawyer, being constantly called upon to defend the liberty and property of his client, must learn to value personal rights. He must be prepared and ready to face hostile

criticism and popular prejudice. He must study history and analyze precedents. He must know men and understand human nature, for his aim is to win men to favor his contentions. He is constantly considering the rights of the individual citizen, and even though while practicing at the bar he may represent a client whose contentions are against the public welfare, once he becomes a member of an independent judiciary, his knowledge and previous study force him to become the protector of individual liberty and the public good.[1]

Whether the courts should have jurisdiction to declare legislative enactments repugnant to the Constitution, is the important consideration, and one naturally asks:

Is it necessary for the preservation of the Constitution, that this tremendous power should be held by the courts? In the absence of such power, would the fundamental law gradually be nullified? Would vicious, unfair and partizan legislation appear upon the statute books? Would tyrannical executives usurp arbitrary powers and destroy individual liberty?

[1] The American Commonwealth, Bryce, Vol. I, p. 265.

Upon our answers to those questions must depend our view as to the wisdom and rightfulness of the judiciary possessing this power.

If we appeal to history, we find all these evil consequences following the lack of a tribunal clothed with just such judicial powers as our courts possess. The Magna Carta of England which, as already said, contained great declarations of human rights, failed for centuries to protect the liberties of the English people, because there was no independent and honest judiciary with power to enforce its provisions.[2]

Time after time European monarchs have been compelled, through some sudden stress of circumstances, to solemnly promise to refrain from arbitrary action, but, when the stress had passed, they resumed their tyrannical conduct. The lesson of history is unless the power to maintain the principles of liberty is vested in some independent and disinterested tribunal liberty will be destroyed.

If we approve of a written constitution and further deem it wise that its provisions

[2] Hurtado *v.* People of California, 110 U. S. 516.

should not be set aside or ignored by the legislature or by any man or body of men except the people themselves in their sovereign capacity as citizens, we must approve of and have a tribunal which has power to say when a legislative or executive act or the act of an inferior court is contrary to the fundamental law.

The provisions of the Constitution are law. A statute passed by a legislature is law. The Constitution is the higher law to which the statute must conform. If the two conflict, there must be some tribunal with power to so declare. The legislature cannot do so, for it has enacted the conflicting statute, and is without power to construe law. The executive cannot, for he is without power to construe law. This leaves only the court to perform this function, and that department of government, being the one to which the construction of law has been confided, is the only department capable of making the decision.

That our courts are endowed with this power and that its exercise is necessary in

a proper case, was decided at a very early day by the Supreme Court of the United States. In the opinion written by Chief Justice Marshall, it was said:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . .
>
> The constitution declares "that no bill of attainder or ex post facto law shall be passed."
>
> If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
>
> "No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
>
> Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature.[3]

If the Constitution, when construed and interpreted by the courts, is found not to be in accordance with the will of the people, it is their privilege and right to change it. In fact, this has often been done, for instance, an early decision of the Supreme Court of the United States held that suit could be brought against a State as against an individual.[4] The people of the States considered this an infringement upon State sovereignty and the Federal Constitution was promptly amended so as to forbid such suits.[5]

Only a few years ago the same court decided the particular form of the federal income tax Congress attempted to impose was invalid, but in 1913 the Constitution was amended by the adoption of the Sixteenth

[3] Marbury *v.* Madison, 1 Cranch (U. S.) 138, 177.
[4] Chisholm *v.* Georgia, 2 Dallas (U. S.) 419.
[5] Hans *v.* Louisiana, 134 U. S. 1.

Amendment, and a new and valid income tax law was enacted.[6]

No one, and least of all the judges who have rendered these decisions, regarded such amendments as a slight or reflection upon the court. The court merely construed and declared the meaning of the law as it was written. Indeed, it has been the common practice for courts, in thus declaring the invalidity of a statute, to point out just what was necessary and could be done to render it valid.

Nor must it be thought that our courts have attempted to arrogate to themselves the right to pass upon the necessity or wisdom or utility of any law which the legislative department, in the exercise of its discretion might lawfully enact under its constitutional power.

A very long line of decisions has marked the boundaries beyond which no court passes. The fact that a law is new or novel, affords no ground for its rejection. The necessity

[6] Brushaber *v.* Union P. R. Co., 240 U. S. 1.

for the law, its wisdom, its usefulness and the benefits to be derived from it, are all for the judgment and discretion of the legislature. A judge may think a law useless or foolish; he may think it unwise, and positively harmful, but unless it can be shown to be repugnant to some specific provisions of the Constitution, the court must enforce it.

The courts do not, to the slightest extent, attempt to exercise a veto power, nor to interfere with the policy or discretion of the legislature. They only determine whether the statute is contrary to the Constitution, and, therefore, beyond the power confided to the legislature.[7]

[7] Cooley's Const. Lim., 7th Ed., p. 236;
Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196;
Interstate Commerce Com. *v.* Illinois C. R. Co., 215 U. S. 452.

XI

THE SUPREME COURT OF THE UNITED STATES

THERE is a complete judicial system in each State and there is also a complete federal judiciary of which the highest tribunal is the Supreme Court in Washington, but since the great mass of litigation involves no question of federal law, most law-suits must terminate finally in the State courts.

The Supreme Court of the United States has no general appellate jurisdiction from State courts. It has the right to review final decisions of a State court only in those cases in which a so-called federal question is involved and was litigated—that is, cases in which there is drawn in question the Constitution, the laws, or a treaty of the United States.

There is one class of actions which, no

matter where they are begun, seldom terminate without an appeal to that court. When legislation for the regulation and control of business is attacked, it is almost invariably claimed that it deprives those opposing it of liberty and property without due process of law. If the claim were true, the law thus attacked would violate the Fourteenth Amendment to the Constitution of the United States. Such a claim draws in question a right guaranteed by the Federal Constitution, and the Federal Supreme Court is the tribunal of last resort, with jurisdiction to pass upon the claim, whether it is a state law or an act of Congress which is so attacked.

A mere statement of this fact shows the tremendous power and importance of that court. It is the final and authoritative exponent of our system of government; if we fail there, we fail everywhere. Of it an impartial observer said:

The Supreme court is the living voice of the Constitution—that is, of the will of the people ex-

pressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.[1]

The Court consists of a Chief Justice and eight Associate Justices. They are appointed for life, or, as it is expressed, during good behavior; their compensation cannot be reduced during their term of office. Ordinarily, the concurrence of five Justices is necessary before judgment is declared.

An appointment to the Supreme Court is made by the President only after the most careful consideration, must be confirmed by the Senate and is naturally the highest honor which can come to an American lawyer.

Being thus appointed for life with a provision of the Constitution preventing a reduction in compensation, the Justices indi-

[1] The American Commonwealth, Bryce, Vol. I, p. 272.

vidually are, and the Court as a tribunal is, absolutely independent. Its character and power, and the wisdom of its decisions have aroused the admiration of the best statesmen of the world, and although during its long existence the power of impeachment has always been vested in Congress, no justice has ever been removed.

The history of the Court and the part it has taken in preserving life, liberty and property, is found in the thousands of decisions it has rendered, printed now in some two hundred and fifty volumes.

The principles of the Declaration of Independence and the enumeration of natural rights found in the Constitution, making up the American System of Government, are not, and never have been, mere oratorical phrases in that Court; they have never been thought obsolete by the officers of that great tribunal.

The claim of a humble citizen that he is about to be deprived of life, liberty or property without due process of law, receives the same consideration as does that of the most

wealthy suitor, or of a great corporation.

For instance, a Chinese laundry-man in San Francisco appealed there, claiming he was, by an ordinance of the city, denied the equal protection of the law. His claim was sustained, the Court, in the course of the opinion, saying:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of a government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. . . .

But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man

may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[2]

During the Civil War one Milligan was arrested under the military authority, tried by Court Martial, which allows of no trial by jury, and was condemned to death. He obtained a writ of habeas corpus and the legality of his trial and judgment came before the Supreme Court. His conviction was set aside and amongst other things the Court said:

. . . it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. . . . The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. . . . Those applicable to this case are found in that clause of the original Constitution which says "that the trial of

[2] Yick *v.* Hopkins, 118 U. S. 356, 369.

all crimes, except in case of impeachment, shall be by jury;" . . . And . . . guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. . . .

Time has proven the discernment of our ancestors; . . . The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[3]

In another case the House of Representatives in Congress sentenced one Kilbourne to be committed for contempt in refusing to answer certain questions. This was held to be beyond the power of the House. The Court said:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, either State or national, are divided into three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate

[3] Ex Parte Milligan, 4 Wallace 1.

body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.[4]

It cannot be too greatly emphasized that the Supreme Court of the United States has not stood in the way of progressive legislation. It has been the great exponent of the police power. From its decisions we have learned how great that power is, and that laws for the regulation of business, both big and little, for improving labor conditions, for conserving the public health by pure food laws, for protecting the weak and ignorant against the strong and cunning, are valid and binding under the Constitution.

Had there been no supreme tribunal to finally interpret the Constitution and give it effect, we would have as many different con-

[4] Kilbourne *v.* Thompson, 13 Otto (U. S.) 168.

structions as there are states. We would have had irreconcilable conflicts between Congress and state legislatures, between the federal and state governments. We would have had chaos instead of law. Without this tribunal, we never could have become a nation.

Whenever Congress has exceeded its authority and usurped a power reserved to the individual States, the Court has called it back to its legitimate domain.[5] When the executive department attempted arbitrary action, its proceedings were arrested.[6] When States have encroached upon the powers granted to the Federal Government or attempted to deprive any person of life, liberty or property without due process of law, the acts have been set aside.[7]

This is what is meant by "a government of laws and not of men:" that a reasonable and definite rule of conduct is prescribed by

[5] Howard *v.* Illinois C. R. Co., 207 U. S. 463; Hammer *v.* Dagenhart, 247 U. S. 251.

[6] United States *v.* Lee, 106 U. S. 196.

[7] Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418.

law, which is binding upon all alike. It is the opposite of class rule and arbitrary action.

If, during the Court's existence of nearly a century and a half, no mistakes had been made, we would be compelled to think it not a human, but a divine tribunal.

But though only human, it has been marvelously wise. Proceeding calmly and deliberately, deciding each case as it arose, refraining from attempting to make hard and fast rules for a people whose manner of life and economic conditions were rapidly changing, it has been the fountain-head of the best thought of America, and the bulwark of our Government.

The opinions handed down in the Supreme Court show the profound learning, the lofty patriotism and the sincere devotion to the cause of liberty which have sustained and animated the Justices of what may be called the greatest and most important civil tribunal the world has ever seen. An examination of even the few decisions referred to in this work will convince any fair-minded citizen of this, without requiring him to master subtle legal distinctions.

XII

A GOVERNMENT MAINTAINING THE CIVILIZATION WHICH CHRISTIANITY HAS PRODUCED

THE analysis of the American Government attempted in the preceding pages is very incomplete, but it is hoped, is sufficient to show the character of our Government and the objects which it seeks to attain.

The system has as a basic principle the right of every human being to freedom, so long as he does no injury to others. If each individual is to be free, he must be protected from the violence and unlawful attacks of those who recognize neither law nor moral obligations. Therefore, the Government must be able to command the respect of the people and be sufficiently strong to afford this protection to the law-abiding citizens.

The Government is also based upon the dignity of labor and upon the duty of each citizen to provide for his own support by his honest efforts and further upon the right of the industrious man to be protected in his ownership of the property he honestly acquires.

Those who believe in these basic principles have common ground upon which to unite for the support of our government, and with them the only question is how best to maintain a free government of that character.

There are two classes of men, however, with whom well disposed American citizens can have no agreement. First, those who do not believe in man's natural right to liberty; and second, those who do not believe in private ownership of property.

Those who believe in universal liberty, coupled with the necessity for individual industry, do so upon certain well recognized principles and equally well recognized tendencies in human nature.

The right of every human being to liberty

was not recognized even in America, until the Civil War, when the Federal Constitution was amended so as to provide:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[1]

Because greed, selfishness and the disposition to tyrannize are among the chief evil passions of mankind, it required more than eighteen hundred years of Christianity to secure that pronouncement. Before the Christian era, human slavery was the accepted order of society; occasionally, a pagan philosopher wrote of liberty and the rights of man, but no one listened, and those who could not, by force, protect their liberties, were enslaved.

Christianity taught the existence of a living God before Whom each man was equal in his natural rights and to Whom all were responsible.

In spite of the crimes committed in its

[1] Const. U. S., XIII Amendment.

name, and in spite of the fact that unscrupulous tyrants in the past often used religion as a cloak to cover their lust for power and conquest, Christianity makes for democracy and freedom. Both Christianity and democracy are based upon the free will and personal responsibility of each individual.

Lincoln ended discussion as to any justification for human slavery when he said: "No man is good enough to own another man;" and so, when the American people, in their written Constitution, declared for liberty of conscience, they said, in effect, that no man, or group of men, could be permitted to force any particular form of religious worship upon other men. This not only ended the religious scandals which corrupt men had caused, but it secured the recognition of those great fundamental truths upon which our government rests.

At the same time the generally accepted tenets of Christian morality are recognized by our laws; thus, when the corporation controlling the Mormon Church was dissolved, the Supreme Court decided the Act of Con-

gress did not violate religious liberty, but was a lawful exercise of power, because the practice of polygamy maintained and inculcated by the Mormon Church was "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World." [1]

This means that the maintenance and protection of the Christian family is a legitimate object for Governmental care. If the Christian family were destroyed, but little would be left of our civilization. The "family" means the well ordered home, in which it is the first right and duty of parents to care for and educate their children.

There are those who deny this; some upon the ground that our marriage laws are wrong; that the association of the sexes should be uncontrolled by anything save present mutual will, and that, if children result from such association, the State must care for them.

There is another group, entirely honest,

[1] Late Corporation of the Church of Jesus Christ of Latter-Day Saints *v.* United States, 136 U. S. 1.

well intentioned and sincere, who, looking only at the failures in family life, are inclined to exaggerate, to an almost equal extent, the duty and province of the state. In their laudable desire to better conditions, some seek to place all the burdens of humanity upon the state and advocate altogether too much supervision and interference by public authority.

While to interfere with properly organized and well conducted private education would be a denial of liberty, it is the province of the state to place the means of education within the reach of all. Without an educated and intelligent citizenship, our democracy must fall. It is also the state's duty to care for abandoned, neglected and defective children, but it has the right to assume complete control and custody of the child, only when the family has hopelessly broken down.

"Liberty," as already said, means more than freedom from personal restraint. It means amongst other things, freedom to maintain those personal relations and recip-

rocal rights and duties which belong to the family life as it has been developed by Christianity and civilization. But to enjoy that freedom, the citizen must assume the responsibilities and duties which belong to freedom. He must strive to live up to established standards. He must be willing by his own industry, to support himself and those dependent upon him. He must give his children an opportunity for education. He cannot be permitted to exploit them and dwarf their minds and bodies by hard labor. If he fails in the one, or attempts the other, the state should act.

The maintenance of the family requires an earning capacity by one or more of its members. Therefore, the dignity of labor must be preserved. Here, again, we have those who would depend upon the state for support, and those who are willing to rely exclusively upon their own efforts, looking to the government only for the preservation of equal opportunities for all.

The most ordinary experience of life teaches us that the happy and successful man

is he who relies upon his own industry and efforts. One very rarely meets a young person who loves study or work. Indeed, most of us go through life with a greater desire to play than to work. It is this which makes alluring the dream of state support and a general sharing of all property. It is a truth, which no law can change, that man requires the spur of necessity. By this is not meant cruel, dismal poverty, but the necessity of earning by one's own efforts the means to live as other men, to support oneself and family in some degree of comfort. Without this incentive to employment in some useful and remunerative occupation, mankind would rapidly degenerate.

We have only to look around us to realize that this is true. The American boy who early in life is thrown upon his own resources, particularly if he has a widowed mother or younger brothers and sisters to support, and who manfully accepts the responsibility, if he is ordinarily intelligent, industrious and well-behaved, always succeeds, while the boy who inherits a fortune and has no incentive

to work, succeeds but rarely. Those who reflect upon life realize that the necessity of work for men or women is not a disaster, but in truth a blessing, which leads to self respect, to a keener interest and enjoyment of life, to health and contentment of mind.

All these—the family, the incentive to industry, the successful life and contented mind—depend upon the right of the industrious man to own and keep that which he has honestly earned. That is the basis for the right of private property.

This, like every other natural right, may be abused. The concentration of huge estates, under the feudal system, became, as already pointed out, a great evil in Europe. Nor is the perpetuation of unduly swollen fortunes in land or personal property necessary to maintain the doctrine of private property. Through its taxing power and the taxing of incomes and inheritances, the government can always regulate these when they become a menace to general prosperity, and in a government like ours, when the necessity

arises the means will be found to remedy the evil.

The man who has the most vital and direct interest in maintaining our doctrine of private property rights is he who, by his industry, has secured, or hopes to secure, a modest home for himself and his family, or who has accumulated a modest competency for his old age, or to support his widow and young children in case of his untimely death.

This is the type of man, also, who has the greatest interest in the maintenance of liberty and democracy. The rich and mighty have always, except perhaps during short periods, been able to protect themselves, but the average man, in the ordinary walks of life, has not fared so well.

Any philosophy of life which ignores these ineradicable tendencies and desires of humanity is false, and any government which ignores them must end in tyranny or anarchy.

To deny the sanctity of the family and the right of private property is to promote anar-

chy. To demand that the state take absolute charge of our children, our property and our industries is to invite tyranny.

To return to what was said in the beginning of this study, it is not claimed that no alteration should ever be made in our Constitution. As in the past, amendments will be made from time to time, to meet new conditions. In the case of state constitutions, wise provisions have been gradually copied by conservative states, from their more progressive neighbors. In the same manner wise and progressive laws appearing first in one state, have spread to others, until their operation has become general. In the same way Congress has legislated as to the concerns within its control.

These remedial and progressive measures have been fiercely opposed, first in legislative halls, and then in the courts; but they have been adopted and sustained and put in operation.

If, after a practical test, they have been found unsatisfactory, they have been amended or repealed. New laws will con-

tinue to appear just as long as there are evils to remedy or wrongs to be righted.

The thoughtful, healthy-minded citizen knows that evil has not been, and never will be, wholly eradicated from humanity. All the government can do is to minimize faulty conditions as far as possible.

Our enemy is he who attributes the poverty, wrong and suffering caused by human limitations, and still more by ignorance, selfishness and crime, to our form of government, and seeks to replace the rule of law by mob rule, or, that which is almost as bad, the rule of some particular class. This is he who seeks to array class against class for the purpose, apparently, of destroying organized society.

Generally people of this description conceal their real purposes and principles. They are very careful before what audiences they ridicule the existence of God or the sanctity of the family. Nevertheless, the destruction of those Christian beliefs is a part of their real purpose.

Vicious attacks made upon some par-

ticular church are but repetitions of the old tactics of unscrupulous politicians, who attempt, by appealing to religious prejudices, to divide those who believe in law and order, and so destroy all Christian belief, a result which they deem necessary to the inauguration of the anarchy they hope to produce.

While such persons are the intentional enemies of organized society, their number in America is comparatively small. Their direct influence is very limited and if their ugly doctrines were fully understood, their propaganda would not be tolerated for an hour.

But we have a large class of good intentioned and well disposed citizens, who are so impatient of control that they denounce all constitutional restraints upon governmental power as barriers to progress. In their desire to improve conditions and advance human happiness, they would sweep aside all the provisions of the Constitution.

If a state is backward in enacting child

labor laws, these good people insist that Congress must at once usurp the power reserved to the states to regulate their respective domestic affairs. If the state is prevented from legislating upon subjects belonging exclusively to the federal government, they bewail the existence of a written Constitution. When the courts refuse to sanction some ill-considered and hastily enacted statute, because it is in conflict with the organic law, or when a court restrains an administrative board from arbitrary action, we are told that our government is not responsive to the will of the people; that an act of the legislature or of Congress and the orders of a commission or board should be supreme and beyond the power of any court to question.

The possession of arbitrary power by any man or tribunal composed of men is dangerous and wrong in itself, without reference to the benevolent intentions of its possessor. Some good people advocate prohibiting the use of tobacco; others, more than two children in each family; others, the use of flesh

meat for food, and thus every faddist seeks to have his particular hobby enforced by a statute.

A constant interference by the state in the details of life and living would not only be intolerable and destructive of individual liberty, but would inevitably tend to destroy the initiative so characteristic of the American citizen, and would result in a state of official tyranny as cruel and as destructive of progress and happiness as the tyranny of any king or emperor.

We should realize that the barriers to the exercise of arbitrary power which the people of America have erected, cannot be removed without endangering liberty. But we should also realize that those provisions do not prevent real progress nor the enactment of enlightened laws for the safeguarding and development of true democracy.

XIII

WHAT AM I TO BE?

IN 1850, Daniel Webster, in his speech for "The Constitution and the Union," discussing the result of a possible secession of any of the states, asked "What is to remain American? What am I to be?" Someone has described this as an instance of magnificent egotism, but it was much more; it expressed the realization by an illustrious American of his individual position and responsibility as a citizen of the Republic.

Each American citizen must recognize that the ultimate responsibility for the preservation of our form of government, while shared by all, ultimately rests upon the individual, and each must ask himself the question propounded by Webster, or, perhaps, changing

somewhat the form of the question, he may ask "What am I to advocate? What do I believe in?"

If we are to change our form of government by tearing down the Constitution, let us, before we begin, at least determine at what part of the edifice the first blow is to be struck.

Shall we destroy the distinction between the departments of government, and place complete and arbitrary power in one? And if so, to which department shall be given the arbitrary power now withheld from any and from all combined?

Shall we make the legislative department supreme, and place each man's liberties at the mercy of whatever faction may be in control, unless he is strong enough to defend himself by force?

Shall we destroy the right of private property, and so deprive industry and thrift of their just rewards?

Shall we destroy the sacredness of family life and with it the home, which is the basis of our civilization?

Shall we repeal the provisions prohibiting slavery, peonage, imprisonment for debt?

Shall we eliminate the bill of rights and restore the possibility of long imprisonment without trial, secret trials, cruel punishment, thumb screws and other instruments of torture to wring confessions of guilt from those accused of crime?

Until the free and upstanding American citizen has determined that he no longer desires those guaranties of personal liberty, he will continue to give his allegiance to the Constitution.

It is nearly a century since the young French nobleman Alexis de Tocqueville described our government as "the great experiment." [1] About the same time Lord Macaulay, arguing against the stability of republics, said: "As for America, we appeal to the twentieth century." [2] Fisk describes Washington, when first elected President, placing the United States "in a proper attitude before

[1] Democracy in America.
[2] Review of Mills Essay on Government.

the mocking nations of Europe." [3] At the time of the Civil War the downfall of the Republic was freely predicted in Europe.

The experiment has succeeded. The Twentieth Century has come; the mockers have been silenced and the predictions of failure have not been fulfilled; but, on the contrary, the Republic has been shown to possess sufficient strength to protect itself from its enemies, foreign and domestic, and has done this and yet granted to each individual full, legitimate liberty. It has grown so strong that it need now fear nothing but the indifference or ill-will of its own citizens, whose life, liberty and happiness it has so well protected. If it were possible to imagine a time of such evil condition, would not the thoughtful citizen find himself repeating Webster's question: "What am I to be?"

For a century and a half, America has presented to the World the spectacle of a government devoted to the maintenance of the natural rights of man. As those rights have come to be better understood, we have

[3] Critical Period of American History.

gone forward with the remedial and progressive legislation, experience has shown necessary.

The end of such legislation has not been reached. Progressive laws will continue to appear if human progress continues, but no good citizen need fear their effect, so long as they must bear the test of compliance with the principles of liberty and justice upon which our government is founded, and no lover of liberty should give his support to any law or official action which cannot bear that test.

To characterize a law as "reactionary" or as "socialistic" means nothing. If it be reactionary to believe in trial by jury, in a free and secret ballot, in public and speedy trials of those accused of crime, in the prevention of class rule or class legislation, in the preservation of the Christian family and in the right of private property, one should be willing to admit he is reactionary. If it be socialistic to hold that the strong should be restrained from injuring the weak, that corporations, as well as individuals, and all organizations in

classes or groups, be controlled and required to respect the public good, child labor prevented, wage earners protected and given fair compensation, the designing prevented from preying upon the confiding, that better conditions of life be secured for the industrious, well-disposed citizen of every walk in life, then one should be willing to be described as socialistic.

The citizen who gives his full allegiance to the great underlying principles of the fundamental law as construed and interpreted by the Supreme Court, and at the same time believes it is the duty of government to be alert and progressive in guarding individual rights, in preserving equal opportunities for all, in rewarding industry and adding to the sum of human happiness, in making men better, fairer and more considerate of their fellowmen, in adjusting upon right lines the interests of capital and labor, may call himself, no matter where he was born, a true American and a loyal supporter of the American Government.

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